

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JAMES D. BEARDEN
Petitioner,
vs.
DOLPHUS A. MCGILL,
Respondent.

No. 93178-0

REPLY TO PETITIONER'S
RESPONSE TO MOTION TO
STRIKE PORTION OF
APPENDICES TO PETITION
FOR REVIEW

Respondent McGill submits this Reply to Petitioner's Response to Respondent's Motion to Strike Portion of Appendices to Petition for Review. Respondent asks this Court to grant the motion to strike.

I. ARGUMENT

A. THE COURT OF APPEALS ORAL ARGUMENT TRANSCRIPT IS NOT A RAP 9.1(a) "RECORD ON REVIEW."

Petitioner contends Appendix C—the transcript of the Court of Appeals argument—complies with the RAP 10.3(a)(8) provisions for an appendix because the transcript is part of the record on review. RAP 9.1(a) states the record on review consists of a report of proceedings, clerk's papers, exhibits, and a certified record of administrative adjudicative proceedings. A report of proceedings may take the form of a verbatim, narrative, or agreed report of proceedings. RAP 9.1(b). RAPs 9.2, 9.3, and 9.4 explain the requirements for these three types of report of proceedings. Each of those rules refers specifically to "trial court"

material. The Court of Appeals transcript is not mentioned and thus is not part of the report of proceedings.

Petitioner suggests the Court of Appeals transcript is an appropriate appendix because it fits within the provisions of RAP 10.4(c). He contends the Petition presents an issue which requires study of “the like”—that the Court of Appeals posed questions at oral argument. This Court’s consideration of a Petition for Review is based on the Court of Appeals’ decision, the parties’ appellate briefs, and the record on review. What was said at the Court of Appeals argument is not an issue presented for review. Appendix C should be stricken.

B. RAP 12.1(b) DOES NOT APPLY.

In an attempt to justify his inclusion of Appendix C, petitioner argues he was surprised by the Court of Appeals’ questioning and the Court of Appeals should have notified the parties prior to oral argument of the “new issue.” RAP 12.1(b) states an appellate court may notify the parties to submit written argument to address “an issue which is not set forth in the briefs” and “should be considered to properly decide a case.” The Court of Appeals’ questions and its decision concerned the comparing comparable issue. The issue was addressed in the parties’ briefs. Respondent McGill briefed the issue of the trial court’s error in the comparing of comparables. See Brief of Appellant at 14-23, Reply Brief

of Appellant at 10-14. And Petitioner Bearden also argued the comparing of comparables. See Brief of Respondent at 15-25. There was no new issue. There was no surprise. Petitioner's RAP 12.1(b) argument does not apply and certainly does not justify Appendix C.

C. APPENDIX E – LEGISLATIVE HISTORY REGARDING THE AMENDMENT TO RCW 7.06.050—IS BOTH NEW MATERIAL AND A NEW ARGUMENT.

Appendix E relates to the 2002 amendment to RCW 7.06.050 which added the offer of compromise provision. Petitioner argues Appendix E is not new material because it relates to legislative intent. The meaning of statutes and legislative intent was addressed in the briefing at the Court of Appeals. E.g. Brief of Appellant at 22-23; Brief of Respondent at 21-22; Reply Brief of Appellant at 13-14.

Petitioner Bearden did not reference RCW 7.06.050 in his brief. The only time RCW 7.06.050 was referenced in the appellate briefs was to distinguish the *Do v. Farmers Ins. Co.* case. See Reply Brief of Appellant at 12. Appendix E is new material and should be stricken.

Petitioner argues Appendix E should remain under this Court's inherent authority to consider new issues necessary to reach a proper decision. No legislative history regarding the 2002 amendment to RCW 7.06.050 is necessary here. The amendment added the offer of compromise provision. This case does not involve an offer of


compromise. This Court need not and should not exercise its authority to consider Appendix E.

II. CONCLUSION

For the reasons stated above, Appendix C and Appendix E should be stricken from the appendices to the Petition for Review.

DATED this 15th day of July, 2016.

REED McCLURE

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JAMES D. BEARDEN
Petitioner,

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DOLPHUS A. MCGILL,
Respondent.

No. 93178-0

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

The undersigned, being first duly sworn on oath, deposes and says:

That she is a citizen of the United States of America; that she is over the age of 18 years, not a party to the above-entitled action, and competent to be a witness therein; that on the date herein listed below, affiant served via electronic mail and U.S. Mail, postage prepaid, copies of ***Reply to Petitioner's Response to Motion to Strike Portion of Appendices to Petition for Review***, together with a copy of this ***Affidavit of Service***, on the following parties:

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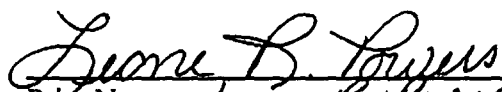
Alice Brown
GEICO Staff Counsel
130 Nickerson Street, Suite 305
Seattle, WA 98109-1658

DATED this 15th day of July, 2016.



Jessica Pitre-Williams

SIGNED AND SWORN to before me on July 15, 2016, by Jessica
Pitre-Williams.


Print Name: Leone R Powers
Notary Public residing at: Sno. Co. WA
My appointment expires: 1/5/19

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Attached for filing please find the following:

- Reply to Petitioner's Response to Motion to Strike Portion of Appendices to Petition for Review
- Affidavit of Service

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